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PRELIMINARY REPORT

ON

Efficiency in the Administration of Justice

PREPARED BY

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FOR

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MEMORANDUM IN RE DRAFT REPORT

The material utilized in this report has been: First, a collection of newspaper clippings from all parts of the country begun in 1907 and continued to the present; second, a card catalogue of decisions from every part of the country in which questions of practice or procedure were involved which seemed to indicate defects or possibilities of improvement; third, a collection of books and articles in periodicals, both legal and lay, dealing with every phase of judicial administration. This material was put at the disposition of the committee by Mr. Pound.

No attempt has been made to discuss any proposition in detail. The purpose has been instead to state what seemed to be the principal causes of inefficiency in the administration of justice as indicated by the materials above referred to.

Conditions differ very much in different parts of the country and many things which are acute in one jurisdiction are quite unknown in another. In most discussions of the subject a tendency appears to assume that a grave local abuse is general to the whole country. Little attention has been paid to local difficulties except as they have seemed to obtain in a considerable number of jurisdictions.

If it is desired, a complete bibliography may easily be appended to the report.

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EFFICIENCY IN THE ADMINISTRATION OF JUSTICE

To the Members of the National Economic League:

Inefficiency in the administration of justice may include two ideas, first, inadequacy of the legal and judicial system to meet the purposes for which public administration of justice is instituted; second, inadequacy of the legal and judicial system to achieve all which the public expects of it. A few words seem to be desirable with respect to the latter. We must recognize that intrinsic difficulties involved in the administration of justice according to law have always operated and are likely always to operate to bring about a certain amount of dissatisfaction with the public administration of justice. The advantages involved in law are purchased at the expense of certain disadvantages. Chief among these is the necessarily mechanical operation of legal rules which is one of the penalties of uniformity. This obstacle to the administration of justice according to law may be minimized but may not be obviated. As laws are general rules, the process of making them involves elimination of elements of particular controversies which are special to those controversies. In eliminating immaterial factors to reach a general rule in view of the infinite variety of controversies and the almost imperceptible differences of degree in their approximation to recognized types it is not possible entirely to avoid the elimination of factors which will be more or less material in some particular controversy. To take account of all these variations an over-wide discretion in the magistrate

would be required. On the other hand, if exceptions and qualifications and provisos are appended to legal rules to any great extent the system of law becomes cumbrous and unworkable. A compromise must be made; a middle course must be found between over-wide discretion and over-minute law making. Necessarily, therefore, legal standards are more or less artificial and a certain amount of divergence between legal and judicial standards on the one hand and the ethical standards of each individual must be looked for. Again, as law formulates settled ethical ideas it cannot in periods of transition accord with the more advanced conceptions of the moment. Formulations of public opinion cannot become effective as laws until public opinion has become fixed and settled and cannot change until a change of public opinion has become reasonably complete. In a time when groups and classes and interests are so diversified that conflicting ideas of justice obtain in the community it is impossible that everyone be satisfied with the public administration of justice. Moreover the layman is apt to assume that the administration of justice is an easy task to which anyone is competent. This feeling that special knowledge and special preparation are not necessary to enable one to pass upon the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. Rules of law sum up the experience of many judges with many cases and enable the magistrate to apply that experience. One who has not had the proper training is seldom more competent to construct or apply such a formula than he is to construct or apply the formulas which enable engineers to make use of the experience of their predecessors. The public is more interested in maintaining the highest scientific standard in the administration of justice than it always realizes. The daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of legal science will be able to meet that criticism does

more than any other agency for the everyday efficiency of courts of justice. Finally law involves restraint and regulation, and necessary and salutary as such restraint and regulation are, individuals are never reconciled to it entirely. This is especially true when a feeling prevails that each individual as an organ of the sovereign democracy may judge how far he shall conform his action at the crisis of action to the law which he has helped to make.

Turning to the matter immediately in hand, namely, inadequacy of the legal and judicial system to achieve the purposes for which law and courts exist, the subject may be taken up under three heads since the judicial administration of justice involves, first, finding and interpreting the law, which means largely making the law; second, the application of law to controversies which are brought before the court by individual litigants; and third, the enforcement of the law where no private person comes forward to raise a controversy.

I. Law-making through the agency of the courts falls short of what it should be through certain general causes operating over the whole country and also through local causes peculiar to particular sections of the country.

The general causes appear to be three. First, the demands of industrial and urban communities raise problems which the existing legal system, fashioned to meet the demands of a pioneer and agricultural community of the first half of the nineteenth century, is not well prepared to meet. The pressure of industrial accidents, a problem unknown to the formative period of our present law, the pressure of social legislation which requires more speedy and sure enforcement than the legislation of the past, may be instanced. Second, the shifting of ideas the world over as to the nature of justice and the end of the law is putting a heavy pressure upon the administration of justice in all parts of the world and only the gradual working out and fixing of the new conception can relieve the

pressure. Third, the great increase of litigation involved in the expansion of commerce and industry and the rapid growth of population has crowded the calendars of our courts to such an extent as to preclude the thoroughness in discussion by counsel and the deliberation in study by the court which is required in a constructive period. For instance, where a century ago a volume of the reports of the Supreme Court of the United States covered a period of fourteen months, during which time eighty-four causes were decided, a single volume of the reports of that court covers the single day of June 16, 1913, in which decisions were rendered in sixty causes. The highest type of judicial law-making may not reasonably be expected under such circumstances.

Three causes of more restricted operation may be said to be local causes. Each of these operates to a certain extent in all of our jurisdictions but much more so in some than in others. These are, first, the tenure, mode of choice and personnel of the bench. Second, the education and organization of the bar. And, third, a bad state of legislative technique.

(i) The best of which judicial law-making is capable may be expected only from the best type of court before which the best type of lawyer practises. So long as the public insists in so many of our jurisdictions upon conditions of tenure and modes of selection which preclude the type of lawyer best fitted to do such work from going upon the bench, and prevent the influence of the bar from being felt as it should be in the selection of judges it is unreasonable to look for improvement of the law through judicial empiricism or for constructive law-making through decisions which may be compared with the classical achievements of the American bench in the constructive period prior to 1850.

In what may be styled fairly the classical period of American law the bench was for a greater portion of the time appointive or, if elective, elected by the legislature and tenure was assured for life. Even after

the movement for an elective judiciary gained strength about 1850, the traditions of the older order maintained a high standard for some time. Since the Civil War, except in New England, the bench has been elective with few exceptions and for the most part for relatively short terms. The constructive work in American law, the adaptation of English case law and English statutes to the needs of a new country and the shaping of them into an American common law, was done by appointed judges while most of the technicality of procedure, mechanical jurisprudence and narrow adherence to eighteenth-century absolute ideas of which the public now complains is the work of elected judges. The illiberal decisions of the last quarter of the nineteenth century to which objection is made today were almost wholly the work of popularly elected judges with short tenure. Moreover, where today we have appointive courts these courts in conservative communities have been liberal in questions of constitutional law where elective judges, holding for short terms, have been strict and reactionary. For illustration one may compare the decisions of the Supreme Court of the United States and of the supreme judicial court of Massachusetts on the subject of liberty of contract with those of the supreme courts of Illinois and Missouri. Also one may compare the decisions of the highest courts of Massachusetts and of New Jersey on the subject of workmen's compensation legislation with the pronouncement of the Court of Appeals of New York. So in procedure, the judicial application of the Massachusetts practice act should be compared with the fate of the New York code of civil procedure of 1848. The later New York code attempted the impossible in the way of detail. But it would have been quite as easy to make technicality of procedure an end in Massachusetts as in New York. A liberal application of the New York code of 1848 by strong judges, resisting the attempt of counsel to use the code in the game of litigation, might have achieved a modern procedure half a cen-

tury ago. Under our system of making law through judicial empiricism almost everything turns on the strength, capacity and learning of the judge. We require much more of a judge than popularity or honest mediocrity or ignorant zeal for the public welfare can bring about. If our system is to work well, experts must be chosen and in consequence the mode of choice must be one which will be governed by expert knowledge of the qualifications of those who are chosen. Experience has shown that in states where the bar have the most influence in the choice of judges the bench achieves the best results. That American law grew so rapidly and was fashioned so well up to the Civil War and stood still so steadfastly for a time thereafter was by no means wholly due to causes that made for rigidity of law throughout the world. It was due in large part to a change in the character of the bench as a whole in our state courts. That this change is closely connected with the change in the mode of choice and tenure of judges which became general after 1850 is demonstrable. For no such change took place in those few jurisdictions in which the courts remained appointive. Because of the mode of choice and of secure tenure the judicial office continued to attract the leaders of the profession. Prior to the era of elective judges, Tilghman and Gibson in Pennsylvania, a succession of judges for twenty-three years in the Supreme Court of New York which no elective bench has been able to approach, the great Georgia bench of 1845, and Blackford in Indiana had shown judicial law-making at its very best. Kent, Marshall, Story, Shaw and Gibson, the ornaments of American judiciary, are of this period; and Chief Justice Doe, the one judge since the Civil War who stands with them in constructive ability, was appointed. There have been strong individual judges under the system of popular election. Moreover, Michigan at one time had one of the strongest courts which has ever sat in the country chosen by popular election. But the succession was not kept up. Nor, except in

this one case, has popular election given us strong courts as a whole. On the other hand exceptionally strong appointive courts since the Civil War have been by no means uncommon. It should be noted also that while judges of the first order have sometimes succeeded in holding their places by popular election, quite as often they have failed to do so.

The unfortunate situation in which the judge sits as a mere umpire in a game between counsel grew up under an elective bench and is to be found chiefly, if not wholly, where the judiciary is elected for short terms. This is true also to a large extent of the well-known abuse which often requires at least as long a time for the selection of a jury as for the trial of a cause. This condition for instance is quite unknown in the federal courts or under the appointed judiciary in Massachusetts and New Jersey. Lack of control over the bar on the part of judges, who cannot insist upon expedition without imperilling their positions, is not the least cause of unnecessary continuances and postponements and of the wranglings of counsel and the unfortunate treatment of witnesses which have cast discredit upon American trials.

Machinery is not the important thing. What is important is that experts be chosen. To that end it is essential that the bar be able to make its influence felt by the selecting authority and that tenure be secure. The bad eminence in rejecting social legislation achieved by elective courts in New York and in Illinois, the equally bad eminence with respect to technicalities of criminal procedure achieved at one time by elective courts in Missouri, Indiana and Texas, and the fate of the codes of procedure at the hands of elective judges show abundantly that an elective judiciary is not necessarily a mode of liberalizing the law. On the contrary, a mediocre bench is almost certain to be technical. Our law is suffering today from the unhappy experiment of two generations ago whereby logical carrying out of an abstract political theory was preferred to expertness and qualification

for their office on the part of officials in whom expertness is of the highest import to the commonwealth. A similar experiment with respect to administrative officers ultimately taught us the value of an expert civil service with secure tenure.

(ii) Likewise so long as the public in so many of our jurisdictions insists upon treating the practice of the law as a mode of earning a livelihood which should be open to everyone and refuses to exact those requirements of preliminary education and thorough professional training which are required not merely to make the lawyer an efficient agent in the public administration of justice through thorough presentation of causes, but also to make him an effective public servant through initiation and promotion of improvements in legal institutions and doctrines, attempts at reform addressed only to judicial machinery will be quite futile.

Until recently there were no serious requirements for admission to the bar outside of a few states. Many states today, some of them old and intelligent, are substantially without such requirements. The legislature of Massachusetts in its present session has forbidden the imposition of any standard of preliminary education. In one state by express constitutional provision good moral character is the sole requisite to admission. Any legal voter of good moral character may practise law. In another state in 1912 there was a debate as to the expediency of requiring candidates for admission to the bar to have attained their majority, and it was stated that "every member of the Court of Appeals began to practise about the age of eighteen." Of late there has been a steady growth of sentiment within and without the bar which has produced more adequate requirements of preliminary study and preliminary general education in a majority of the states. But this improvement is the work of a few years, is still in progress in many states, and has much farther to go everywhere. In no state is there any requirement that those who come to the bar have

that minimum of general education which will enable them to deal properly with the social and economic questions which our polity commits to the courts.

(iii) Not the least cause of inefficiency in the exercise of the law-finding or law-making function of our courts is the bad state of legislative technique which exists in most American jurisdictions. Legislative reference bureaus are remedying this evil to some extent, and no doubt these bureaus and the study of the science of legislation which is now becoming general will gradually improve our enacted law. But as the matter stands, in many of the states the law has an enormous mass of legislation imposed upon it annually which is worked out on no common system, is coördinated neither with the existing law nor with its several parts, and is often inconsistent with itself on fundamental points. This is true particularly with respect to legislation in matters of criminal law. Moralists, sociologists and criminologists are by no means agreed as to the basis of punitive justice, and satisfaction of a public desire for vengeance is regarded by many as a legitimate as well as practically necessary end of penal treatment of offenders, while others regard the retributive theory as the bane of criminal law. This disagreement is reflected in legislation. Not only do statutes enacted at different times proceed upon different theories, but adherents of one theory will procure one measure and those of a different theory another from the same legislators, who have no theory of their own. The courts are required to make a workable system out of this mass of legislation. But it must be clear that the task is difficult and must involve much experimenting that impairs the effectiveness of the legal system.

Standing parliamentary counsel, after the English and Canadian model, and more general study of the principles and practice of legislation seem to be the only immediate remedies available.

II. With respect to the application of law to litigated causes brought before the courts by injured

parties, the causes of inefficiency may once more be divided into general causes and local causes.

A. Five general causes appear to be important: (1) the defective organization of our courts; (2) the want of proper organization of the administrative and clerical side of our tribunals; (3) our procedure; (4) the concurrent jurisdiction of state and federal courts; and (5) the strong tendency of our law to local particularism. Each of these may be looked at briefly.

(1) Three circumstances determined our present American judicial organization: (1) The organization of English courts at the Revolution; (2) the need of a rapid making over of English common law and legislation into a common law for America in a period when little could be achieved in such a field by legislation, and hence courts alone could be looked to; and (3) the demand for decentralizing the administration of justice and bringing justice to every man's door in the rural American community of the first half of the last century. The result was a system of separate courts with a fixed staff, not available in any other tribunal, no matter how great the arrears in one or lack of business in another, a setting up of a machine for developing the law by judicial decision rather than one for the adjudication of causes, and a system of specialized local courts instead of specialist judges. Thus we waste judicial power in the United States in three ways. One is by multiplication of tribunals with hard and fast personnel and hard and fast jurisdiction. Another is by the vicious practice of rapid rotation which prevails in so many jurisdictions, whereby no one judge acquires a thorough experience of any one class of business. Thus each spends valuable public time in learning the art of handling special classes of judicial work only to pass on to some other special class where he must learn a wholly new art. Where the specialist would act with assurance and decision, one who comes fresh to a special field of judicial administration must needs proceed painfully and cautiously. Still another form of

waste is the treatment of controversies piecemeal, part in one court or proceeding and part in another, with no power to refer all the proceedings to one tribunal. Thus conflicts often arise which set court against court, although both are set up to the same end. And if conflict does not ensue, as, for instance, where the jurisdiction of equity to give complete relief may be invoked, the attempt to administer justice in detached fragments, even if more or less successful, involves delay, expense and waste of judicial time in hearing over again the common elements in the controversy, already heard by others, but necessary to an understanding of each particular phase. These defects are more acute in some states than in others. But in one form or another they may be found everywhere.

Effective administration of justice in the urban communities of today requires a unification of the judicial system whereby the whole judicial power of the state shall be vested in one organization, of which all tribunals shall be branches or departments or divisions. In organizing the personnel of this unified judicial department, the cardinal idea should be to permit the entire judicial force of the commonwealth to be employed in the most effective manner possible upon the whole judicial business of the commonwealth, aiming to have specialist judges rather than specialized courts. Multiplication of tribunals is the first attempt of the law to meet the demand for specialization and division of labor. Yet it is at best a crude device. The need is for judges who are specialists in the class of causes with which they have to deal. This need may be met by specialized courts with specialized jurisdiction. But it may be met, also, by a unified court with specialist judges, to whom special classes of litigation are assigned. Undoubtedly much specialization is desirable and will be desirable increasingly in the future. But concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forum and the venue at

the expense of the merits, and judges who can do but one thing, no matter how little of that is to be done nor how much of something else, are not the way to provide therefor. Rather there should be specialized judges. As cases of a certain class become numerous and require that a specialist consider them, judges should be designated from the staff of the whole court for that purpose and the causes should be assigned to such judges, in the one court in which all causes are entered, by some functionary, whose duty it is to see that the judicial power of the commonwealth is fully utilized and is utilized to the best advantage.

Some one high official of the court should be charged with supervision of the judicial business of the whole court, and he should be responsible for failure to utilize the judicial power of the commonwealth effectively. He should have the power to superintend the calendars of the different branches and divisions and to make such classifications and distributions of the business in each branch or division as experience shows to be suited to advance its work. He should have power to make reassignments of judges or temporary assignments to particular branches or divisions or localities as the state of judicial business, vacancies in office, illness of judges, or casualties may require. He should have the power, according to general rules, framed by the court and improved as experience dictates, to transfer or specially assign causes or proceedings for hearing or disposition according to the condition of the calendars. He should be responsible to the people for insuring that the whole judicial power of the commonwealth is fully and effectively employed upon all the business of the court. Moreover, under the general superintendency of this head of the court, there should be a like judicial officer, since no clerk should be given such powers, for each branch and division, and where there are large cities, for each locality. This officer should have similar powers with respect to the branch, division or locality of which he is the chief or presiding judge, and should be responsible to

the chief of the whole court for the classification and distribution of its business and effective disposition of the causes assigned to it. Concentration of responsibility in this way should be a sufficient safeguard against abuse of these offices.

(ii) Organization of the administrative and clerical side of the courts is of nearly equal importance. Legislation ought not to prescribe the details of this organization. So far as possible, the court should be allowed to settle them by rules devised, amended or abrogated as experience dictates. But, above all, the court should be given control of the clerical and administrative force through a chief clerk, responsible to the court for the conduct of this part of its work. We have hampered the administration of justice by the extreme to which we have carried the decentralization of courts. In many jurisdictions the clerks are independent officers, over whom the courts have little or no control. Even clerks of supreme and intermediate appellate tribunals are sometimes elective officers. Nearly everywhere the clerk of the court of record of general jurisdiction in each county is elected. Thus, he is under no administrative control and is largely free from judicial control. Each clerk's office is independent of every other. It is no one's duty to study the system, suggest improvements, or enforce them when made. What responsibility will do in this connection, when joined to corresponding power, is shown in the Municipal Court of Chicago, where the system of abbreviated records is said to have effected a saving of $200,000 a year. Moreover, if courts are to do the work demanded of the law in large cities of diverse population and in industrial communities, they must develop much greater administrative efficiency, and must be able to compete in this respect with administrative boards and commissions. In the conventional American judicial organization, the administrative officers of importance are elected independently, have sole control of their offices, and are responsible only to the electorate. In practice this division of

responsibility means no responsibility. Hence very little progress has been made toward efficiency upon a side of judicial administration where most of the cost of litigation is incurred. Statistics in the last report of the Municipal Court of Chicago show that the administrative and clerical work of the court, with all the savings which have been effected, still costs more for each case than the purely judicial work.

(iii) As to procedure, two preliminary points should be emphasized. First, procedural reform is not a panacea. Not only are there several other problems connected with the administration of justice in America which are of equal or even greater importance, but three of them have a direct and immediate relation to procedural reform, namely, the personnel, mode of choice and tenure of judges, the organization of courts, and, in consequence, of judicial business, and the organization, training and traditions of the bar. Except and until these three matters are attended to, the best practice act the wit of man can devise will fail of much effect. If they are attended to, an inferior practice act may be made very tolerable. Secondly, there is the greatest diversity in procedure in the different states. Jurisdictions whose procedure is admirable in some respects are very backward in other respects. But few generalizations are possible. Much misunderstanding has arisen from assuming without warrant, that particular abuses which obtain in a single jurisdiction are typical of the procedure of all states. Sometimes they are anomalous even in the particular state. In other words, while there are general evils which exist throughout the United States, the problem of procedural reform is largely local, and must be studied specially with reference to the conditions that obtain in each state.

There appear to be ten respects in which procedure generally, or in a very large number of states, contributes to inefficiency in the administration of justice. (a) In most jurisdictions there is too much legislation as to the details of procedure, so that the details are

too hard and fast, and it is too difficult to alter them in case they work badly. Legislation should deal only with the general features of procedure, prescribing the general lines to be followed, but leaving details to be settled by rules of court, which may be changed as actual experience of their application and operation dictates. Practice acts of this type have been adopted in New Jersey and in Colorado, and a similar measure, fathered by the American Bar Association, is now pending in Congress. In contrast with these simple statutes, the New York code of civil procedure, with over 3,400 sections, prevents the courts from dealing effectively with questions of practice, invites constant legislative amendment in matters of detail, and fills the reports of that state with decisions upon procedure.

(b) Taking the country as a whole, there is not only too much of hard and fast rule in procedure but the rules are treated too much as giving procedural rights to parties which they are entitled to vindicate although their substantive rights may not be affected. Except as they exist for the saving of public time and maintenance of the dignity of tribunals, so that the parties should not be able to insist as of right upon enforcement of them, rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity. In case of a variance, the inquiry should be, did the party who complained ask for time or opportunity to meet the point of which he was not fairly apprised and for which he was not prepared, and was he given a fair chance to meet it? Where no other advantage could be had than securing a fair opportunity to meet proof adduced without fair notice, very few complaints of variance would be made. What this would mean may be understood by turning to a paper in one of our legal periodicals on "Taking advantage of variance on appeal," in which

it took twenty pages and citation of 338 decisions of the courts of one state to set out the mechanics of the subject in that one state. An American observer commented recently upon the difference between the American and the British Consular Courts in China, as follows: "In the British court the direct dive to the gist of the matter before the court, and, the intolerance of technicalities is what astounds and impresses the American lawyer. The wearying, formal, perfunctory round of demurrers and motions is entirely missing. Mere technical objections are easily and impatiently waved aside, and exceptions to pleadings right speedily cured wherever possible without postponement. Hence, being unsuccessful in achieving any advantage, such objections tend to lapse into disuse." In other words, rules meant to save time and advance the business of the court are not permitted to waste time and obstruct the business of the court by becoming the subject of contest between the parties, and rules meant to protect the parties may be availed of to achieve that end and for no other purpose. Being of no avail as substitutes for substantive points, they tend to lapse into disuse. This is coming to pass with us also as our courts year by year give less weight to points of practice.

(c) There is too much of what may be called record-worship; too much attention to the common-law record as an end in itself. The function of a judicial record should be to preserve a permanent memorial of what has been done in a cause; the court should be able at all stages to try the case, not the record, and, except as a record of what has been done may be necessary to protect substantive rights of parties as the suit progresses, the sole concern of the court with respect to the record should be to see to it that at the termination of the litigation it records the judgment rendered and the causes of action and defenses adjudicated. A single instance may illustrate the delay, expense and confusion which comes from trying records rather than cases. In 1881 a United

States Circuit Court had before it an action of ejectment in which the plaintiff's pleading set up title under the children of a testator and set forth a gift in the will to the widow so long as she remained a widow, with a gift to the children in case she remarried. The defendants claimed under a conveyance of the fee by the widow. Upon demurrer, the Circuit Court held that the plaintiff's pleading disclosed a power in the widow to convey the fee prior to her remarriage, and rendered judgment for the defendant. The record was taken on error to the Supreme Court of the United States, which held, on the provisions of the will set forth in the pleadings, that the wife took a life estate only, with no power of conveying a fee, and reversed the judgment. Thereupon suit in equity was brought in the state court by a large number of persons claiming under the conveyances by the widow, setting up a conspiracy to get the litigation over the title into the federal court by fraud, praying an injunction against numerous suits in the federal court, and asking to have the title quieted in the plaintiffs. This suit was removed to the United States Circuit Court, and a motion to remand was refused. On error in the Supreme Court of the United States, however, that order was reversed, and it was directed that the cause be remanded to the state court. The suit in equity now went forward in the state court, the whole case was presented, and the court, having the whole will and all the extrinsic evidence bearing upon its construction before it, decided that upon a proper construction, the widow took a power to convey in fee. This construction was affirmed on appeal by the supreme court of the state. In reaching its conclusion, the latter court was governed largely by evidence in the cause showing the situation of fact to which the will was to be applied, particularly the number of the objects of the testator's bounty, their means of support, actual and prospective, when he made the will, and the obvious impossibility of his family maintaining itself after his death unless the fee of the land

could be disposed of. The federal supreme court having tried the record and the state supreme court the case, naturally enough with divergent results, a race for the federal court began on the part of grantees of the children. Litigation ensued, also, to determine who were entitled to the benefit of the decree in the state court, as a result of which some seven grantees were excluded. Next, the decree of the state court was taken to the supreme court of the United States on error. But the court could only try the record. It could not, at this stage, determine whether, with the whole case before it, its former pronouncement on the demurrer gave a sound construction of the will. It could only say that no federal question was involved in the record. Moreover, as to a purchaser, claiming under the children, who had obtained judgments in the federal circuit court, the cause remained open. Hence a further suit in equity in the state court against this purchaser became necessary, and ejectment actions against grantees of the purchaser, in which they claimed under his judgments, ensued. At length, in an action of ejectment in the federal circuit court, in order to put the matter to rest, counsel agreed upon a special verdict presenting the case. Judgment was rendered, error was taken in the circuit court of appeals, and that court certified the cause to the Supreme Court of the United States. But that court, upon the record, found itself still precluded from deciding the case. The pleadings, through a general denial, put in issue the citizenship of the plaintiff, and the special verdict was silent on that point. Hence, although no one questioned that his citizenship was in fact what he alleged it to be, a new trial was necessary to save the form of the record. Accordingly, the farce of a new trial was gone through with, a new special verdict was drawn up, a new judgment was rendered, error was taken anew in the circuit court of appeals, the cause was certified anew to the Supreme Court of the United States, and that court at last, after thirteen years of

litigation, having a record before it which allowed it to decide the case, held that the state supreme court was right and that the widow took a power of disposition of the fee. Thus at the end of thirteen years, during which time the litigation had been five times in the Supreme Court of the United States, twice in the circuit court of appeals, and four times in the state supreme court, the construction of the will was determined. But in the meantime many whose purses were not long enough to keep up the fight yielded to judgments in ejectment in the federal court based on the first opinion of the federal supreme court, and sued their grantors upon covenants of warranty. As these grantors had not felt able to continue the litigation when notified to do so, they were compelled to pay damages, although, in the event, they had conveyed a good title. Such are the results of making of the record an end, rather than a means.

(d) Pleadings preserve too many characteristics of the time when mechanical modes of trial required sharp, formal issues. The office of pleadings should be to give notice to the respective parties of the claims, defenses and cross demands asserted by their adversaries; wherever that office may be performed sufficiently without pleadings, pleading should be unnecessary, and where pleadings are required, the pleader should not be held to state all the legal elements of claim, defense or cross demand, but merely to apprise his adversary fairly of what such claim, defense or cross demand is to be. Pleadings for any other purposes than the two named are now done away with in proceedings before commissions, in probate causes and the allowance of claims against estates, and in the far western states in litigation over water rights. Happily the tendency to treat formal pleadings at law and in equity more liberally has become so general in the past few years that it is enough to say that potential pitfalls still exist in which the unwary are sometimes caught with the result that justice is deferred. Thus, in one of our states during

the present year, judgment in a proceeding to set aside assessments for paving was reversed because the pleading which set up fraud on the part of the city council in accepting the paving did not state the facts constituting fraud.

(e) There is too much throwing of causes out of court when a transfer or a change of procedural form would save the proceedings already had. No cause, proceeding or appeal should be dismissed, rejected or thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved. This practice now obtains by statute in an increasing number of states. How the old practice operates may be illustrated by a case decided in January of the present year in one of our larger states. In this case action was brought in 1912 for $350 upon a contract for the purchase of a piano. After trial and verdict for $167, the judgment was reversed, with directions to dismiss the cause, because it was brought in the wrong county. Thus two years of litigation have been wholly in vain.

(f) There is too much piecemeal disposition of controversies. The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full content and applied to every type of proceeding. For example: In a western state, a long litigation began with the issuance of a writ of mandamus in July, 1899, by means of which the defendants obtained $10,000, held by the promoters of a corporation. The order allowing the writ was then reversed by the supreme court on the ground that mandamus was not the proper remedy. No question as to whether the defendants were entitled to the money could be passed on, so the cause was remanded. In the trial court the cause was dismissed by the relators; but afterwards, upon motion of the trustee in bankruptcy of the corporation, the dismissal was set aside, and the relators were ordered

to show cause why there should not be restitution of the money. In response to this order, they appeared specially and objected to the jurisdiction of the court, and their objections were sustained. This last ruling was then reversed by the supreme court, still passing solely on questions of practice, and the cause was again remanded. Thereupon the defendants brought an independent suit to enjoin further proceedings under the order to show cause and to establish an equitable defense. The trial court granted the injunction, but on mandamus proceedings in the supreme court, it was ordered that the injunction be vacated. The original case was now heard on the order to show cause, and restitution was ordered. On appeal, however, the supreme court reversed the order and discharged the order to show cause. But it still refused to foreclose the controversy, saying: "It is not to be supposed that the refusal of this order in *these proceedings* would constitute a bar to a prosecution of the claim of the trustee against the defendants in a *suitable action brought for that purpose.*" Accordingly the trustee sued, his petition was demurred to, judgment went against him, and on the fifth determination in the supreme court, in September, 1905, after six years of litigation at the expense of the assets of an insolvent company, the judgment was affirmed.

(g) Our procedure at law involves too many trials and too much retrial. So far as possible, all questions of fact should be disposed of finally upon one trial. When a new trial is granted, it should be only a new trial of the question or questions with respect to which the verdict or finding is wrong, if separable, and trial courts should have the power and the duty of submitting causes and taking verdicts in the alternative, so that judgment may be rendered upon the one which the ultimate decision as to the question of law involved may require. In a recent case some boys were engaged in harassing a Chinaman. He turned on them with a hatchet, and one in order to escape, ran in front of a car and was killed. The question of law

whether what the boy did in fright under such circumstances amounted to contributory negligence was decisive. Under the practice which prevails in the federal courts and in the majority of state courts, the trial judge would be required to rule one way or the other on this question. If he held there was contributory negligence, he would direct a verdict for the defendant. Then if the reviewing court held otherwise, a new trial would be necessary after a considerable lapse of time when the testimony was no longer fresh. If he held there was not contributory negligence, the cause would go on and very likely result in a verdict for the plaintiff. Upon review of this, the court of appellate jurisdiction could only order a new trial, and on this new trial in many jurisdictions it would be possible for the plaintiff's evidence to be quite different as to the circumstances of the accident, and very likely the case would go to the court of review once more to determine whether upon the new evidence the verdict could stand. In some jurisdictions causes have been tried as many as eight times successively in this way. Over and above the expense and delay involved, the invitation to perjury is obvious. In a number of jurisdictions, including the one in which the cause above referred to was decided, it is possible in such a case for the trial judge to submit the questions of fact to the jury, reserving the question of law, and leave it to the higher court to say whether upon the facts found by the jury there shall be judgment for the damages found, if any, or a final judgment for the defendant.

(h) In most jurisdictions there is too little power of guidance of the jury by the court. Juries are left at large to be swayed by advocacy with no judicial corrective. It is often said that we cannot trust our judges to exercise the common-law power of advising juries. But if we cannot provide a type of judge adequate to the demands of the judicial office, we must not expect the administration of justice to be efficient.

Our sole resource for correcting bad verdicts is what has been called "the monstrous penalty of a new trial." The excessive number of new trials with resulting delay and expense, which have disgraced American justice in the immediate past, is chiefly attributable to the want of a proper check upon juries at the trial, compelling our courts of review to vindicate the law and insure justice *after* verdict by the only means in their power. This is illustrated especially in criminal causes, wherein it is a constant practice in many states to reverse convictions because of unfair and improper argument by the prosecuting officer. In jurisdictions where the trial court may deal with such argument effectively in an oral charge such reversals are unknown. Again one of the most difficult problems before those who seek to reform procedure today is the matter of expert evidence. But there is general concurrence among those who have studied the subject in the view that if trial judges were given the power to deal with expert evidence effectively in the charge to the jury and if they were so selected as to put men of proper caliber upon the bench, the question would largely solve itself.

(i) It is probable that we make too much use of the jury as a tribunal for ordinary civil causes. The delay and expense involved in jury trials are very great, and wherever the volume of litigation is large and courts are in session continually, service upon juries has become a grave burden upon the citizen. It is worthy of consideration whether there are advantages in jury trial of ordinary causes upon debt or contract and commercial cases to compensate for the expenditure of time and money which such trial requires. Even in actions upon tort, now that workmen's compensation acts are removing from the forum cases in which plaintiffs looked to juries to mitigate the law, it may be doubted whether jury trial should be used so widely. Assault and battery, malicious prosecution, slander and libels and breach of promise,

the cases to which it is coming to be restricted in England, seem the civil cases best suited to this mode of trial.

(j) In most jurisdictions also there is too much appellate procedure. There is no reason why appellate procedure should be involved or technical. The appeal should be treated as a motion for a rehearing or for new trial, or for vacation or modification of the judgment or order complained of before another court, and the procedure should be as simple as that upon motion. A few years ago, a computation made from the current volumes of the national reporter system showed that four per cent. of the points decided by American appellate courts were points of appellate procedure. Where a simple appellate practice obtains as in England, such questions are substantially unknown.

(iv) In those parts of the country in which resort to the federal courts in case of diversity of citizenship is common the concurrent jurisdiction of state and federal courts on the ground of diverse citizenship often causes much delay, expense, and uncertainty. Causes often hang in the air between the two jurisdictions, and it sometimes happens that after they have been taken to the federal court and tried there, a remand becomes necessary, or, if brought in that court and tried, a defect of jurisdiction is discovered, and expensive proceedings go for nought. Moreover, the differences in the view which state and federal courts respectively take as to the law applicable to the same case result in irritation which has somewhat impaired the usefulness of the federal courts in some localities. In consequence foreign insurance companies are coming to be prohibited from bringing causes in or removing them to the federal courts by legislation in a continually increasing number of states. A situation in which a policy on the same property, destroyed by the same fire would be dealt with in one way if the insurance amounted to more than two thousand dollars and in another if it was less than that sum, or in

one way if issued by a domestic company and in another if issued by a company chartered by another state, proved quite intolerable.

(v) A spirit of provincialism or particularism in our law is also a general cause of failure to achieve the best possible results in judicial administration. We foster local peculiarities and even anomalies in substantive law and in procedure as if they had some intrinsic importance. So little does our legal tradition value universality, that our uniform commercial acts are in some danger of being interpreted differently in different states.

B. Three causes of local operation remain to be noticed.

(i) Metropolitan cities raise special and difficult problems. In a heterogeneous community, containing elements ignorant of our institutions, on the one hand suspicious of authority and of magistrates, and on the other hand unable to understand our tenderness of individual liberty, the legal and judicial machinery devised for homogeneous, rural, agricultural communities of the first half of the nineteenth century necessarily breaks down. In too many jurisdictions a hard and fast system of courts, uniform throughout the state, is prescribed by the constitution, so that it is not possible to adjust the administration of justice in large cities to this condition.

(ii) In many parts of the country no adequate provision exists for disposition of so-called petty causes in large cities. The setting up of municipal courts, with a higher type of judge and a central organization is remedying this condition. But except where such courts exist, in petty causes, that is with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery by which rights are secured practically defeats rights by making it impracticable to assert them when infringed. Municipal courts such as those of Chicago and of Cleveland indicate the way in which this condition

may be met until a unification of the entire judicial system is effected.

(iii) In some jurisdictions the undue regard of a pioneer community for the interests of debtors, who had removed to the frontier to begin life anew, led to legal institutions and procedural methods intended to obstruct the collection of debts and the realization of legal claims. There is evidence that this tendency to favor debtors, which belongs to a past condition of the jurisdictions in question, has been turned to account by a class of habitual defendants of quite another type. For example, it has been charged repeatedly that in one state, formerly representative of the frontier but now containing two large cities, rules of practice designed to hold off the non-resident creditor have come to be used by the traction companies to defeat just claims for personal injuries.

III. The causes of inefficiency in enforcement as distinguished from application of the law, may also be classified as general causes and local causes.

A. Four general causes are noteworthy: (i) Want of proper coördination between law and administration; (ii) the breakdown of the common-law polity of individual initiative in enforcement; (iii) the heavy burden imposed upon law in that we call on it to do what was formerly achieved through the church and the home, and so demand that it do more than can be done through legal machinery; (iv) divergence of class interests in a community no longer homogeneous, often leading to legislation in the interest of a class, enforcement whereof is opposed or resisted by another class, with the community at large, as like as not, quite indifferent; and (v) a failure of popular interest in justice, so that, just as our machinery of primaries and elections does not always produce the best results of which it is capable, because citizens neglect to go to the polls, our judicial machinery does not always work as well as it might because they shirk or evade jury service and do not insist actively upon maintenance of the right at whatever cost. Our Anglo-Ameri-

can legal system postulates an active popular interest in justice. In communities which are too busy to take an interest in the maintenance of right through law, or too heterogeneous to have reasonably fixed and generally accepted notions of justice, such a system will not operate effectively.

B. Local causes. Two causes of inefficiency in enforcement of law are of local operation in many of our jurisdictions.

(i) One is diversity of interests in different parts of the same state which lead to laws imposed by one section on another and to resistance of their enforcement by the latter.

(ii) A second is the close contact of criminal law and its enforcement with politics. To some extent this operates everywhere. There is little danger of political oppression through civil litigation. There is constant fear of political oppression through the criminal law. Not only is one class suspicious of attempts by another to force its ideas on the community under penalty of prosecution but the power of a majority to visit with punishment practices which an active minority consider in no wise objectionable is liable to abuse and whether rightly or wrongly used puts a strain upon criminal law and administration. Besides the close relation of administration of the criminal law to politics permits public prosecutors when the public conscience is active to be spectacular at the expense of efficiency, and when it is sluggish to be lax for fear of offending interests. These are doubtless to some extent inherent difficulties in the administration of punitive justice growing out of the inevitable relation between enforcement of the criminal law and politics. There is much evidence, however, that the influence of politics upon the enforcement of the law by public prosecutors often goes much beyond the inevitable minimum. The same considerations that call for civil service with respect to administrative officers apply also to the staff of our prosecuting officers in large

cities where a considerable number of subordinates is required.

Many of the stock complaints with reference to the administration of criminal justice in the United States grow out of results of this connection between the enforcement of the criminal law and politics. Pressure is put upon elective prosecutors to make a record of convictions. The machinery of criminal procedure designed to protect the accused does not lend itself to the making of such a record. Hence the temptation to exceed the limits of the law in order to enforce the law which is involved in what are called third-degree confessions. It should be said in this connection, however, that legislation permitting a public examination of accused persons under proper judicial safeguards would probably put an end to such abuses and make the criminal law much more effective.

Reviewing the several causes of inefficiency in the administration of justice above set forth it is evident that no panacea is to be found. The main points to which we should address ourselves appear to be: (1) Proper training of the legal profession; (2) giving the bar greater influence in the selection of judges so as to insure expert qualifications in those who are to perform an expert's function; (3) unification of the judicial system and more effective and responsible control of judicial and administrative business; (4) giving power to the courts to make rules of procedure and thus giving the courts power to do what we require of them; (5) improvement of legislative law-making both in substance and in technique; and (6) thorough study of the new problems which an industrial and urban society has raised and of the means of meeting them with the jural materials at hand.

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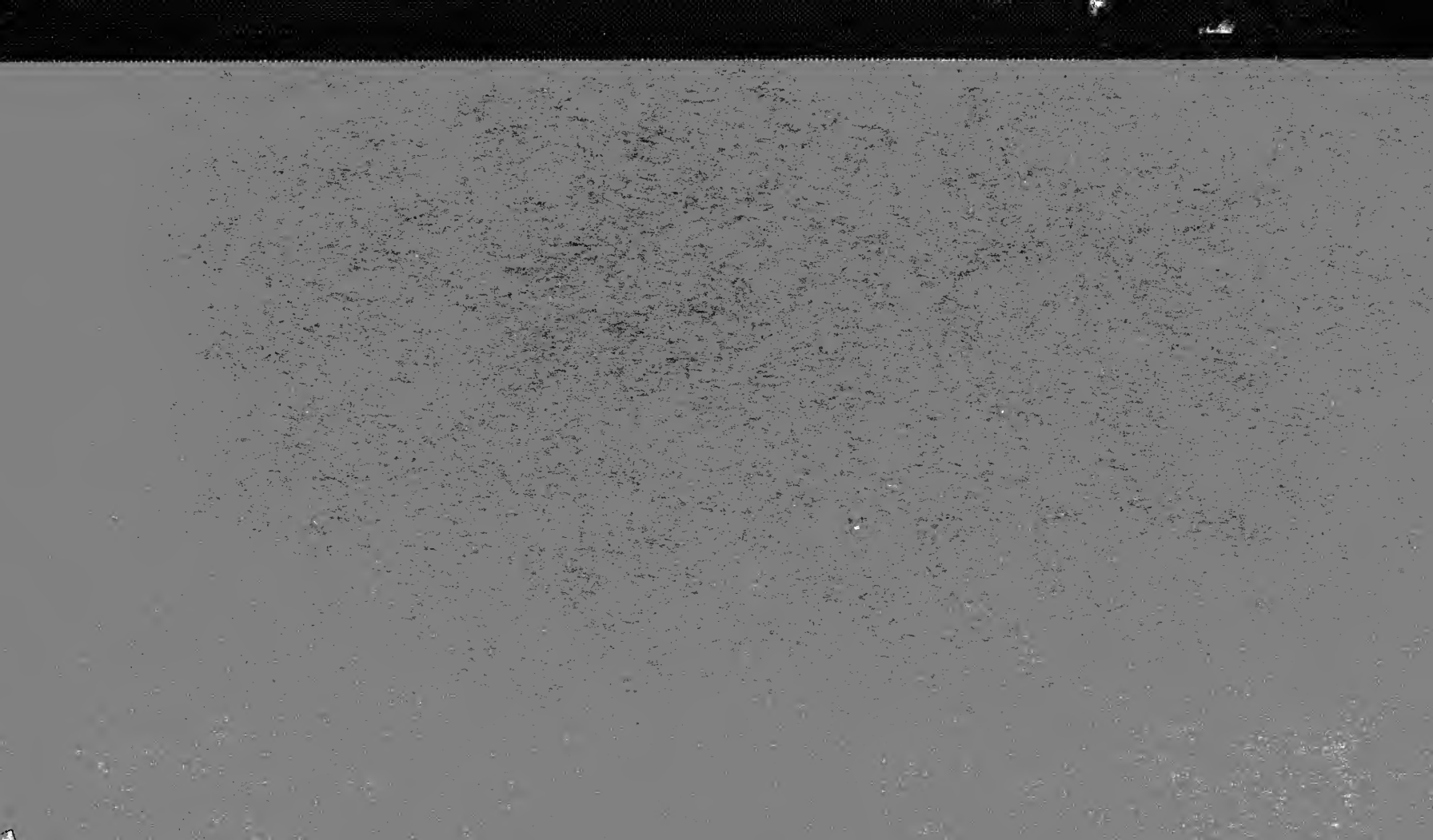
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